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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 289

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

WALTER W. TAYLOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 6) has not yet been reported. The opinion of the Circuit Court of Appeals (R. 33) is reported in 70 F. (2d) 619.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 18, 1934. (R. 36.) The petition for a writ of certiorari was filed August 14, 1934, and granted October 8, 1934. The jurisdiction of

this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court of Appeals erred in remanding this case to the Board of Tax Appeals for a new hearing on the ground that the Commissioner's determination of the amount of income was incorrect, although the taxpayer had failed to prove facts from which a correct determination could be made.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 28–30.

STATEMENT

The pertinent facts may be thus summarized:

Shortly before August, 1927, the taxpayer secured options to purchase for specified amounts either the stocks or properties of four small public utility companies in Vermont. (R. 7.) In August, 1927, he exercised the options, purchasing the stocks of three of the companies and the assets of the fourth and paying therefor $96,030. (R. 3, 7.) He then organized a separate corporation to which he conveyed the assets of the fourth company, receiving its stock in exchange. (R. 7.) On September 1, 1927, he organized a holding company (R. 25) to which, on October 13, 1927, he conveyed the stocks of the four operating companies and received in

exchange all the stock of the holding company, being 1,000 shares of preferred stock without par value, entitled to cumulative preferred dividends of $6 per share and callable at $105 per share; 2,500 shares of Class A no par common, callable at $35 per share; and 5,000 shares of Class B no par common. (R. 7.) The Class B stock had full voting power. (R. 3.) The preferred stock was entitled to $100 per share on liquidation prior to distribution to the other two classes of stock; the Class A common stock was entitled to a preference in distribution of $35 a share over the Class B common. (R. 25.)

In May, 1928, the holding company sold the stocks of these four operating companies for $194,930.16. Thereafter, in the year 1928, the taxpayer sold his preferred stock in the holding company to that company for $99,000. In his income tax return for 1928 the taxpayer reported the sale of this preferred stock assigning $96,030, the original aggregate cost of the stocks and assets acquired by him in August, 1927, as the cost of the preferred stock, and $99,000 as the sales price, with resulting profit of $2,070. (R. 7.) When the taxpayer transferred the stocks of the utility companies to the holding company, the transaction came under the reorganization provisions of the Revenue Act of 1926, and resulted in no tax at that time. Therefore, the basis for determining gain or loss with respect to the sale of the stock of the holding company would be

the same as the stock exchanged therefor. The taxpayer, however, did not sell all his stock in the holding company but only the preferred, making it necessary to ascertain the cost of the preferred stock as the basis for determining the gain on its sale. (R. 7–8.)

The Commissioner determined that of the total cost of $96,030 to the taxpayer for the several classes of stock of the holding company, $\frac{99,000}{194,930.17}$, or $48,771.16, should be allocated to the preferred stock as its cost and the balance to the common stock as its cost. The cost thus apportioned to the preferred stock deducted from the admitted sale price of $99,000 produced a profit of $50,228.84 on the sale of that stock. (R. 8.)

Upon appeal to the Board of Tax Appeals, the Commissioner's determination was sustained on the ground that the taxpayer had not shown that such determination was incorrect, or, in any event, that the amount properly to be allocated to the preferred stock as its cost was any different from that determined by the Commissioner. (R. 9.)

The Circuit Court of Appeals, one judge dissenting, reversed the decision of the Board of Tax Appeals and remanded the cause to the Board for a new hearing on the ground that the Commissioner's determination of cost basis of the preferred stock was wrong, although the taxpayer had failed to introduce evidence to show the correct basis. (R. 33–36.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the taxpayer had discharged the burden of proof resting upon him merely by showing that the Commissioner's determination was wrong without proof of facts from which a correct determination could be made.

2. In remanding the cause to the Board of Tax Appeals for further proceedings in conformity with the opinion of the Circuit Court of Appeals.

3. In holding that the Commissioner's determination was plainly erroneous.

4. In reversing the order of the Board of Tax Appeals sustaining the Commissioner's determination.

SUMMARY OF ARGUMENT

1. The Board of Tax Appeals approved the Commissioner's allocation to the preferred stock of a part of the total cost to the taxpayer of the preferred and common stocks on the ground that the taxpayer had not only failed to show that the Commissioner's allocation was incorrect, but that in any event the taxpayer had not shown what different allocation should have been made. This action of the Board was correct, since it was incumbent upon the taxpayer not merely to show that the Commissioner's determination was erroneous, but to disclose sufficient facts from which a correct determination could be made. This well-settled rule applies to proceedings involving deficiencies

before the Board, as well as to suits to recover taxes unlawfully collected or withheld.

2. In cases coming from the Board of Tax Appeals the Circuit Courts of Appeals have power to remand only when the decision is not in accordance with law. Since, in the instant case, the Board reached the only possible decision on the record before it, the court below was without power except to affirm.

ARGUMENT

I

THE BURDEN ON THE TAXPAYER IS NOT ONLY TO PROVE THAT THE COMMISSIONER'S DETERMINATION IS ERRONEOUS, BUT TO SHOW THE CORRECT AMOUNT OF THE TAX

The question before the Circuit Court of Appeals in this case was whether the Board of Tax Appeals erred, as a matter of law, in approving the Commissioner's determination. If it did, the decision of the court below is correct; if the Board did not err, on the record before it, the Circuit Court of Appeals had power only to affirm.

It is the function of the Board of Tax Appeals to "redetermine the correct amount of the deficiency." Revenue Act of 1926, Section 274 (e) (U. S. C. App., Title 26, Sec. 1049 (a)), c. 27, 44 Stat. 9. Accordingly, where the Board decides that the Commissioner's determination is erroneous, its decision must determine what the correct

tax liability is. Therefore, it is apparent that the taxpayer's obligation goes beyond showing the Commissioner's determination to be erroneous; if the taxpayer stopped there, the Board would be unable to determine the correct tax. The presumption of correctness attaching to the Commissioner's determination does not disappear until the Board determines that the facts established satisfactorily overcome it. Further, in order to sustain his petition for redetermination, the taxpayer must show the correct amount of the tax. That this is true appears when it is considered that, from the beginning, the taxpayer is required to show the correct amount of tax and the facts upon which the tax is based. Sections 51 (a) and 54 (a) of the Revenue Act of 1928, *infra*, p. 28.

Since the establishment of the Board of Tax Appeals in 1924, it has been settled law that the burden of proof is on the petitioner. This arises both from the positive rule of the Board to this effect,[1] under its express authority to prescribe rules of evidence and procedure before it,[2] and from the long established rule that not only does a presumption of correctness accompany the Commissioner's determination but that, in order to set

[1] RULE 30. *Burden of Proof.*—The burden of proof shall be upon the petitioner, except as otherwise provided by statute and except that in respect of any new matter pleaded in his answer, it shall be upon the respondent.

[2] Sec. 900 (h) (U. S. C., Title 26, Sec. 1219), Revenue Act of 1924, c. 234, 43 Stat. 253.

it aside, the taxpayer must disclose facts necessary for a correct determination. See *United States* v. *Rindskopf,* 105 U. S. 418; *United States* v. *Anderson,* 269 U. S. 422, 443; *Reinecke* v. *Spalding,* 280 U. S. 227, 233.

Congress has recognized the existence of the general burden on the taxpayer before the Board by expressly excepting issues of fraud and transferee liability. Prior to the Revenue Act of 1928 even in these cases the burden rested upon the taxpayer to overcome the heavy presumption in favor of the Commissioner's determination. By that Act[3] it was definitely provided that, in any proceeding involving the issue whether the petitioner had been guilty of fraud with intent to evade the tax, the burden of proof on such issue should be on the Commissioner. And in transferee proceedings "before the Board the burden of proof shall be upon the Commissioner to show that a petitioner is liable as a transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax."[4]

The court below, however, has modified the rule as applied to the instant case. It has attempted to justify its action upon the ground that in proceedings on deficiencies before the Board, the bur-

[3] Sec. 601 (U. S. C. Sup. VII, Title 26, Sec. 612), Revenue Act of 1928, c. 852, 45 Stat. 791.

[4] Sec. 602 (U. S. C. Sup. VII, Title 26, Sec. 619), Revenue Act of 1928.

den on the taxpayer did not go so far as in the case of suits in the courts to recover taxes unlawfully collected or withheld, and further, that the rule in cases involving deductions was different from that in cases involving income items. It is submitted that the distinctions are not valid and that the rule of law is subject to no such modification.

No distinction has been made by this Court, or heretofore by the Circuit Courts of Appeals, in the application of the rule. In cases arising on deficiencies this Court has many times recognized and given effect to it. *Lucas* v. *Kansas City Structural Steel Co.*, 281 U. S. 264, 271; *Burnet* v. *Houston*, 283 U. S. 223, 227; *Phillips* v. *Commissioner*, 283 U. S. 589; *Welch* v. *Helvering*, 290 U. S. 111. In *Lucas* v. *Kansas City Structural Steel Co., supra*, involving an item of income as distinguished from a deduction, this Court said (p. 271):

> The Company's case falls far short of meeting the heavy burden of proving that the Commissioner's action was plainly arbitrary.

All of the Circuit Courts of Appeals have applied the rule to cases coming before the Board. Illustrative cases are compiled below.[5]

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[5] *DeFord* v. *Commissioner*, 29 F. (2d) 532 (C. C. A. 1st); *Darcy* v. *Commissioner*, 66 F. (2d) 581, 585 (C. C. A. 2d), certiorari denied, 290 U. S. 705; *Ruud* v. *Commissioner*, 45 F. (2d) 63 (C. C. A. 3d); *Anchor Co.* v. *Commissioner*, 42 F. (2d) 99 (C. C. A. 4th); *Avery* v. *Commissioner*, 22 F. (2d) 6 (C. C. A. 5th); *Louisville Cooperage Co.* v. *Commis-*

The Circuit Court of Appeals for the Second Circuit has itself often applied the rule which, we submit, is controlling here. In the recent case of *Darcy* v. *Commissioner,* 66 F. (2d) 581, 585, certiorari denied, 290 U. S. 705, which involved an addition to the taxpayer's gross income as distinguished from a claimed deduction, that court said (p. 585):

> The burden is upon the petitioners to show the correct amount of the tax in order to show that the commissioner's determination was wrong. Compare *Burnet* v. *Houston,* 283 U. S. 223, 228; 51 S. Ct. 413, 75 L. Ed. 991; *Reinecke* v. *Spalding,* 280 U. S. 227, 232, 233, 50 S. Ct. 96, 74 L. Ed. 385. In a situation like this, that requires proof that the amount of the deficiency is erroneous, for it is that fact, and not the method of computation, which controls.

And to the same effect are *Hubinger* v. *Commissioner,* 36 F. (2d) 724 (C. C. A. 2d), certiorari denied, 281 U. S. 741; *Sanderson* v. *Commissioner,* 42 F. (2d) 160 (C. C. A. 2d); *Autosales Corp.* v. *Commissioner,* 43 F. (2d) 931 (C. C. A. 2d); *Onondaga Co.* v. *Commissioner,* 50 F. (2d) 397 (C. C. A. 2d), certiorari denied, 284 U. S. 671.

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sioner, 47 F. (2d) 599 (C. C. A. 6th); *Commissioner* v. *Langwell Real Estate Corp.*, 47 F. (2d) 841 (C. C. A. 7th); *Twin City Tile & Marble Co.* v. *Commissioner*, 32 F. (2d) 229 (C. C. A. 8th); *Matern* v. *Commissioner*, 61 F. (2d) 663 (C. C. A. 9th); *Prey Bros. Live Stock Commission Co.* v. *Commissioner*, 36 F. (2d) 326 (C. C. A. 10th); *W. K. Henderson Iron Works & Supply Co.* v. *Blair*, 25 F. (2d) 538 (App. D. C.).

The instant case, in holding that the taxpayer was required to show only that the Commissioner's determination was incorrect, conflicts in principle with recent cases in other circuits which have applied the rule that the burden is on the taxpayer to show the correct amount of the tax in order to have the Commissioner's determination set aside. *Saxman Coal & Coke Co.* v. *Commissioner,* 43 F. (2d) 556 (C. C. A. 3d); *Williams* v. *Commissioner,* 45 F. (2d) 61 (C. C. A. 5th); *Alexander Sprunt & Son* v. *Commissioner,* 64 F. (2d) 424 (C. C. A. 4th); *Atlantic Bank & Trust Co.* v. *Commissioner,* 59 F. (2d) 363 (C. C. A. 4th); *Lightsey* v. *Commissioner,* 63 F. (2d) 254 (C. C. A. 4th); *Matern* v. *Commissioner,* 61 F. (2d) 663 (C. C. A. 9th). In the *Matern* case, which involved items of gross income, the court said (p. 666):

> Since the record here fails to supply information that enabled the Board of Tax Appeals to say that the Commissioner's determination was erroneous, or, if it was, to determine the correct amount of the tax, the board was bound to affirm the action of the Commissioner.
>
> In other words, the presumption of correctness is attached to the Commissioner's findings. The Board of Tax Appeals, after weighing the evidence, found that such evidence was not sufficient to rebut the presumption. The duty of weighing the evidence rests upon the board, and not upon

this court. Nevertheless, we are of the opinion that the board's view of the record was correct.

Williams v. *Commissioner, supra,* like the instant case, related to securities upon which the Commissioner had placed a different value than the taxpayer for purposes of establishing a gain.

The fact that a deficiency determined by the Commissioner is too great does not mean that the whole is erroneous; and the taxpayer is required to show in a proceeding before the Board how much of the deficiency is not due or that no deficiency is owing, for the same reason that in a suit for refund he must show that he is not liable for the whole or a part of the amount collected.

In *Atlanta Casket Co.* v. *Rose,* 22 F. (2d) 800 (C. C. A. 5th), it is stated that it is elementary, in suing to recover taxes, that the burden is on the plaintiff to allege and prove what the correct amount should be; and that it is immaterial what method the collector uses in making his assessment. If such be the rule, where the taxpayer is testing his liability for taxes by a suit to recover money claimed to have been wrongfully exacted from him as taxes, certainly it is not unreasonable to say that the same rule applies in a proceeding, likewise to test his liability for taxes, which was adopted solely for the benefit of the taxpayer to afford him an opportunity to be heard on the question of his liability without the necessity of prior payment of the amount claimed to be due from him.

In *Becker* v. *United States,* 21 F. (2d) 1003 (C. C. A. 5th), a suit was brought by the United States to recover the amount of an assessment which the taxpayer claimed to be erroneous. The court held that the taxpayer must show how much should be disallowed, since, upon proof that the assessment should be reduced by any particular amount, the Government would still be entitled to the remainder.

The court below stated that, if the burden of proof goes so far as to demand not only that the taxpayer show that the deficiency assessed against him is wrong, but what is the proper deficiency, or that there should be none at all, the decision was right, even though it appeared the tax was too high (R. 35).

It has been shown that the rule does go so far, and plainly so, as appears from its consistent application by this Court and by all the Circuit Courts of Appeals. It follows, therefore, that the Board of Tax Appeals rendered the only decision it could possibly have rendered upon the evidence before it, since there was no evidence to sustain a different determination.

That this is true appears from the Commissioner's determination and what the respondent established before the Board to refute it. The determination of the Commissioner was essentially not a valuation of property but an allocation—an apportionment between classes of stock of an aggre-

gate cost basis which is not disputed. The provisions of the statute and the regulations thereunder, Article 58, Treasury Regulations 74, *infra*, require only that a fair apportionment—not an exact one—be reached.

The respondent's only contention before the Board was that the cost basis assigned by the Commissioner to the preferred stock was too low; that of the admitted aggregate cost basis of the common and preferred stocks of $96,030, the whole of this sum should be apportioned to the preferred stock, since in his incorporation of his holding company he had arranged that it be entitled to cumulative dividends of $6 per share and to a priority of $100 per share on liquidation over the common. The respondent's whole effort and proof before the Board went on the theory that, if the total value of the assets acquired by the holding corporation did not at the time of such acquisition exceed the sum ($100,000) to which, by reason of its preference, the preferred stock was entitled upon liquidation, then it followed, as a matter of law, that neither class of common had any value and that, therefore, the total cost to respondent of the assets exchanged by him for such stock should be allocated in its entirety to the preferred. But such is not the case. The $48,771.16 assigned by the Commissioner to the preferred stock did not represent its value at date of acquisition by the taxpayer or at any other date, but only the proportionate part of the orig-

inal cost to the taxpayer of the stocks and assets of the operating companies. Even if the amounts used by the Commissioner in his formula for making the allocation were derived from values some eight months after the date of the exchange, and were thus improper elements because based upon conditions remote in time, the result reached by the formula may nevertheless have been correct. Furthermore, the amounts used were the only definite factors appearing in the record which might have been used to achieve a fair apportionment.

This Court, in a recent case, approved the use of a formula by the Commissioner to establish a basis for gain on sale of property. *Burnet* v. *S. & L. Bldg. Corp.*, 288 U. S. 406. There the court said (pp. 414, 415):

> The Commissioner's treatment of the excess of the mortgages on the 83rd Street property over the base cost followed the general purpose to place reasonable limitation upon the spread of the tax. It was appropriate in the unusual circumstances presented—certainly not prohibited. It was a practical way to accomplish the end. Some possible departure from the method prescribed for ordinary circumstances is not enough to destroy what he deemed necessary to meet unusual conditions.
>
> * * * * *
>
> The Commissioner and Board of Tax Appeals have practical knowledge of the intri-

> cate details incident to tax problems and their determination in circumstances like those under consideration here should be given effect when not clearly contrary to the will of Congress.

The applicable regulations, Article 58, *infra*, provide for apportionment except in cases where it is "impracticable." Unlike the instant case, *Kirkland* v. *Burnet*, 57 F. (2d) 608 (App. D. C.), relied upon by petitioner and the court below, is an example of where this is so. It was stipulated there that, at the time of purchase, it was "impracticable" to apportion the cost between the preferred and common stock. On this ground the court reversed the Board, without remanding for further hearing, and held the case was one precisely within the contemplation of Article 39, Treasury Regulations 65, which is substantially the same as Article 58, Treasury Regulations 74, *infra*, p. 30. The court below agreed (R. 35) that there was no showing here that allocation was impracticable.

This case does not present any unusual circumstances which, as suggested by the respondent, would justify or require that the burden of proof rule be relaxed. After the Board's decision, the taxpayer made an application for rehearing to enable him to present evidence as to the practicability of an allocation of cost, and, if practicable, the correct one. (R. 9.) This application was accompanied by affiidavits to the effect that the case was tried with the assent of counsel for the Commis-

sioner on a theory which did not demand an allocation. (R. 16.) The petition for rehearing was denied by the Board. (R. 2.) In the Circuit Court of Appeals the point was vigorously pressed but that court termed the affidavits "exceedingly vague and unsatisfactory", and refused to consider them. Furthermore, the Commissioner denied that he had ever agreed to the theory claimed by the taxpayer. In a case where it appeared that the Commissioner actually contributed to the taxpayer's failure to make proper proof, the Government sought no review. *Wyoming Investment Co.* v. *Commissioner,* 70 F. (2d) 191 (C. C. A. 10th).

II

IN THE ABSENCE OF ERROR THE CIRCUIT COURT OF APPEALS WAS WITHOUT POWER TO REMAND FOR FURTHER HEARING

If, as we contend, the Board properly affirmed on the ground that the taxpayer had not proved that the amount to be allocated to the preferred stock was any different from that determined by the Commissioner, there was no error of law in the Board's decision. The Circuit Courts of Appeals have no power to remand a case unless the decision of the Board is not in accordance with law. Revenue Act of 1926, Section 1003 (b), *infra,* p. 28. It has been so held in *Houston* v. *Commissioner,* 53 F. (2d) 445 (C. C. A. 3d), and *Thom* v. *Burnet,* 55 F. (2d) 1039 (App. D. C.), and the de-

cision of the court below in remanding the instant case to the Board for a new hearing is in conflict with those cases. This Court has similarly construed the power of a Circuit Court of Appeals to remand under R. S. 701, *Realty Acceptance Corporation* v. *Montgomery*, 284 U. S. 547.

The Circuit Court of Appeals for the Third Circuit correctly applied the rule in *Houston* v. *Commissioner, supra*, upon a mandate from this Court (*Burnet* v. *Houston*, 283 U. S. 223), to take such further proceedings in the case, in conformity with its opinion and judgment, as according to right and justice ought to be had. The Circuit Court of Appeals had reversed the Board on a finding by the latter that it was necessary for the taxpayer to show the March 1, 1913 value of certain property in order to establish the basis for a loss on its final disposition in 1920. The Circuit Court of Appeals held that only its cost in 1906 and the proceeds from its sale in 1920 were important. Upon review here, this Court in turn reversed the Circuit Court of Appeals and agreed with the Board that the 1913 value was a necessary element, that it was incumbent upon the taxpayer to prove that value as best he could, and that if it was impossible to prove that value, such a failure was a misfortune to be borne by the taxpayer as in other cases of failure of proof.

Upon remand to the Circuit Court of Appeals that court had before it the question of its power

to remand to the Board. The Commissioner challenged the court's right to remand for further hearing where the taxpayer had had one opportunity to prove his case but had failed to do so. The Circuit Court of Appeals considered the question carefully and held that, as the Board's decision was "in accordance with law" on the evidence presented before it, the court was without power to remand. It said (p. 448):

> They had their day in court and opportunity to submit evidence, if they had any, to establish this fact. They either could not produce such evidence or thought it was unnecessary. However that may be, the Board of Tax Appeals decided the case in accordance with the law as declared by the Supreme Court, and, its decision being "in accordance with law," we have never had power to remand the case. It follows that the petitions must be denied.

And in *Thom* v. *Burnet, supra,* in reply to the insistence of the taxpayer that the case be remanded to the Board for further hearing to determine the extent of worthlessness of a debt, the Court of Appeals for the District of Columbia said (p. 1040):

> For our jurisdiction to remand a case to the Board of Tax Appeals arises under the statute only if a case has been decided there "not in accordance with law." Section 1003 of the act (26 U. S. C. A., Sec. 1226). But as we are of opinion that the decision of this

> case by the Board of Tax Appeals was in accordance with law, it follows that we are without power to remand it for further proceedings. *Houston* v. *Commissioner of Internal Revenue* (C. C. A. 3d, 53 F. (2d) 445); * * *.

The Circuit Courts of Appeals review only errors of law committed by the Board of Tax Appeals, and the remanding of cases for further hearings should be confined to those cases where the Board has declined to admit pertinent evidence or has committed some other prejudicial error which could be corrected only by a rehearing. If there could be any doubt that this was the purpose of Congress it is completely dispelled by the legislative history of the Revenue Act of 1928, c. 852, 45 Stat. 791. The Revenue Bill of 1928 (H. R. No. 1, 70th Cong., 1st Sess.) in Section 601 proposed the amendment of Sections 906 and 907 (a) and (b) of the Revenue Act of 1924, c. 234, 43 Stat. 253. As proposed by the Bill, the amendment to Section 907 (b) contained the following language (p. 206):

> No decision of the Board shall be modified or reversed because the Board or any of its divisions has failed to consider evidence not adduced before the Board or division.

The explanation of this provision is found in the report of the Committee on Ways and Means of the House of Representatives (Report No. 2, 70th Cong., 1st Sess., pp. 30–31) which stated:

Sections 601 and 602 make a number of amendments with respect to the procedure of the Board of Tax Appeals.

* * * * *

Force and Effect of Rules.—A recent decision by the circuit court of appeals for the seventh circuit indicates that there is some disposition to regard the Board of Tax Appeals as an investigative rather than a judicial body, and to require it to reach its decisions not merely on the basis of the evidence presented in the record, but on the basis of such additional evidence outside the record as may be necessary fully to develop the taxpayer's case. The committee is of the opinion that the board's function is purely judicial, and in order to clarify the situation has provided that no decision of the board (whether rendered before or after the bill becomes law) should hereafter be modified or reversed because the board or any of its divisions has failed to consider evidence not adduced before the board or division. At the same time the committee has provided that the rules of practice and procedure of the board shall, just as the Federal equity rules, have the force and effect of law.

The provision proposed in the House Bill was subsequently stricken out. The omission is explained in the report of the Senate Committee on Finance (Report No. 960, 70th Cong., 1st Sess., p. 38), as follows:

Modification or reversal of board decision.—In view of certain expressions in a

> recent court opinion, the House bill in section 601 provides that no decision of the board shall be modified or reversed because the board has failed to consider evidence not adduced before it. While an appellate court has the right and duty, if an error of law has been made, to remand a case to the board for subsequent proceedings in accordance with law, the existing provisions of law clearly contemplate judicial, not administrative, procedure on the part of the board and the committee can see no need of further legislation on this subject. It is not the duty of the board to make investigations of tax cases but to decide the case on the basis of evidence properly placed before it by the commissioner and the taxpayer.

The court below apparently predicated its authority to remand the case upon its decision that the *finding of the Commissioner* was positively wrong. We have argued heretofore the finding was not plainly wrong but, even if it were, we submit that that fact alone would not justify the judgment of the court below. It was not the finding of the Commissioner which was being reviewed but a decision of the Board of Tax Appeals which although initiated upon a determination of the Commissioner, was made in a proceeding of a quasi-judicial character upon issues framed by the pleadings. If the decision of the Board of Tax Appeals was in accordance with law, the Circuit Court of Appeals had no authority to remand because of

error by the Commissioner. Many of the cases cited by the court below may be distinguished. Those that may be said to support the decision, we believe to be in error.

In *Collin* v. *Commissioner,* 32 F. (2d) 753 (C. C. A. 6th), the Commissioner, in computing the gain on the sale of stock, had allocated the entire cost of both preferred and common stock to the preferred. The court held that this action was not supported by the evidence and remanded the case for retrial. It will be noted that the court in this instance condemned the action of the Commissioner in attempting to do the very thing the respondent herein is urging should be done in his case.

Rhode Island Hospital T. Co. v. *Commissioner,* 29 F. (2d) 339, 342 (C. C. A. 1st), involved redetermination of a profits-tax deficiency, the Commissioner having denied an addition to reserves for bad debts for 1921. The court remanded for error of law because it plainly appeared that the Board had disregarded competent evidence.

In *Strother* v. *Commissioner,* 55 F. (2d) 626, 633 (C. C. A. 4th), a companion case of *Bankers Pocahontas Coal Co.* v. *Commissioner,* 287 U. S. 308, 309, it was conceded by counsel for the Commissioner in the Circuit Court of Appeals that the taxpayer could not reasonably be expected to maintain the complete burden of proof until the companion case was settled.

The evidence in *Underwood* v. *Commissioner,* 56 F. (2d) 67 (C. C. A. 4th), disclosed that the Commissioner had taxed the particular item of gross income there involved, and the Commissioner's action was sustained by the Board of Tax Appeals. The taxpayer contended that the item was not taxable. No question was presented to the Board that, if the item was taxable, it was subject to certain deductions. The Circuit Court of Appeals held that the Board was right in deciding that the item was taxable, but despite the fact that no issue as to deductions was presented to the Board and despite the fact that the Board had committed no error, the case was remanded for further hearing. In this we submit that the court exceeded its authority.

Eau Claire Book & Stationery Co. v. *Commissioner,* 65 F. (2d) 125 (C. C. A. 7th), is contrary to the established rule, but it appears that from the evidence before it the Board's action was probably arbitrary in disregarding evidence of value.

Ferguson v. *Commissioner,* 59 F. (2d) 893 (C. C. A. 10th), appears to have been remanded for further evidence because of an erroneous assumption by both parties as to a material fact. The court there said (p. 894):

> We feel certain that petitioner's loss was not compensated for by insurance, yet we doubt that we can take judicial notice of that fact; and conclude petitioner should have pleaded and proved it. However, since in the prior proceedings the parties appar-

> ently assumed that the loss was not compensated for and the Commissioner raises the question here for the first time, we are of the opinion that the case should be remanded to the Board with instructions to take evidence on the question of whether the loss was compensated for, and, if the Board finds it was not, to direct the allowance of the deduction.

The power conferred by the Revenue Act of 1926, *infra,* is one of review, not of appeal. The jurisdiction conferred is to affirm, or, if the decision of the Board is not in accordance with law, to modify or reverse such decision. But a finding on a question of value reached by the taxing officer or Board within the scope of the authority conferred by law, made in good faith, and in the absence of gross mistake or other irregularity, has long been held by the courts as conclusive. *Tracy* v. *Commissioner,* 53 F. (2d), 575, 578 (C. C. A. 6th), certiorari denied, 287 U. S. 632. There the court said (pp. 578, 579):

> But, whatever doubt there may have been as to the extent to which courts will accept the findings of fact of the Board of Tax Appeals, such doubts are laid at rest by the decision in the case of *Phillips* v. *Commissioner,* 283 U. S. 589, 600, 51 S. Ct. 608, 75 L. Ed. 1289. * * * This is but another way of saying that the decision of the taxing board must prevail if it is not contrary to the "indisputable character of the evidence" or if the evidence is "legally sufficient to sustain" such

finding. The evidence is legally sufficient to sustain the finding if there be substantial evidence to support it, and the record as a whole does not clearly, convincingly, or even possibly, "indisputably", require a contrary conclusion.

The statute was not designed to afford either the taxpayer or the Commissioner an additional opportunity to present evidence in support of their contentions. If the decisions relied upon by the respondent tend to support that view of the statute, it is submitted they are plainly wrong and contrary to the generally recognized rule—alike applicable to cases to recover taxes unlawfully collected or withheld and those involving deficiencies.

The effect of the decision below is uncertain, but it might be construed to impose upon the Commissioner the duty of proving on rehearing a new proposed deficiency—a difficult proposition, since the facts with respect to the valuation of assets and the income of the operating companies, which the court below suggested as a datum to arrive at the correct cost basis of the preferred stock, are peculiarly within the knowledge of the taxpayer and his associates. Conceivably, as a result of the court's decision, the Commissioner might have to make a series of subsequent determinations if the taxpayer shows that each is wrong without showing the correct amount—clearly an undesirable situation from the standpoint of efficient tax administration.

The rule that a presumption of correctness attaches to the Commissioner's determination, until sufficient facts are submitted by the taxpayer from which a correct determination may be made, is vitiated if the Circuit Courts of Appeals have power to require the Board to reopen cases after failure of such proof by the taxpayer upon the first trial. Taxpayers would be permitted to try their cases piecemeal, and no consistent rules of practice and procedure could be enforced by the Board.

CONCLUSION

The respondent had a full and fair hearing, without prejudicial error, before the Board of Tax Appeals. If the determination of the Commissioner was wrong, the taxpayer did not present sufficient facts from which a correct determination could be made, and thus failed to sustain the burden resting upon him. In these circumstances, it is respectfully submitted that the Circuit Court of Appeals was without power to remand this cause for further proceedings.

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NOVEMBER 1934.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 1003. (a) The Circuit Court of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require. (U. S. C. App., Title 26, Sec. 1226.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 807, 808:

SEC. 51. INDIVIDUAL RETURNS.

(a) *Requirement.*—The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title * * *.

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By taxpayer.*—Every person liable to any tax imposed by this title or for the collection thereof, shall keep such records, render under oath such statements, make such

returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe. * * *

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

(d) *Recognition of gain or loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112. * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(6) *Tax-free exchanges generally.*—If the property was acquired upon an exchange described in section 112 (b) to (e), inclusive, the basis shall be the same as in the case of the property exchanged, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon such exchange under the law applicable to the year in which the exchange was made. * * *

Treasury Regulations 74:

ART. 58. *Sale of stock and rights.* * * * Where common stock is received as a bonus with the purchase of preferred stock or bonds, the total purchase price shall be fairly apportioned between such common stock and the securities purchased for the purpose of determining the portion of the cost attributable to each class of stock or securities, but if that should be impracticable in any case, no profit on any subsequent sale of any part of the stock or securities will be realized until out of the proceeds of sales shall have been recovered the total cost. * * *

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